(2)

Supreme Court, U.S.
FILED

No. 04- 04-765 DEC 2 - 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the due process clauses of the 5th and 14th Amendments to the United States Constitution require the states to permit an untimely appeal from the denial of state post-conviction relief where that appeal is untimely solely through an error of counsel and in disregard of specific instructions from a capital defendant.

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OPINIONS BELOW

The *per curiam* opinion of the Supreme Court of Alabama is unreported and is reproduced at Appendix A. The opinion of the Alabama Court of Criminal Appeals is reported at No. CR-03-0021, 2004 WL 102861 (Ala. Crim. App. Jan. 23, 2004) and is reproduced at Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The opinion below was entered on September 3, 2004. This timely petition for a writ of certiorari follows.

CONSTITUTIONAL PROVISIONS INVOKED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Alabama seeks to execute a capital defendant and at the same time deny that defendant access to its courts solely because of a fundamental error of counsel. The Supreme Court of Florida has held that such a rule violates federal due process. The Supreme Court of Alabama has held that it does not.

This Court should now grant certiorari to resolve a settled conflict between state courts of last resort over the meaning of an important federal constitutional right – the bedrock right of due process. The fact that this case involves a death sentence only adds to the importance of granting certiorari.

FACTS AND PROCEEDINGS BELOW

Petitioner Cory Maples was convicted of a double murder and – based on the 10-2 recommendation of an Alabama jury – sentenced to death.[1] The Alabama courts affirmed Mr. Maples's conviction and sentence on direct appeal.[2]

On August 1, 2001, Mr. Maples sought state collateral review of his conviction and sentence by filing a Petition for

1. On October 30, 1997, Cory Maples was convicted of two counts of capital murder in Morgan County, Alabama and sentenced to death. *See Maples v. State*, 758 So. 2d 1, 14 (Ala. Crim. App. 1999).

2. On March 26, 1999, the Alabama Court of Criminal Appeals affirmed Mr. Maples's conviction and sentence. *See Maples v. State*, 758 So. 2d 1, 14 (Ala. Crim. App. 1999). On December 10, 1999, the Alabama Supreme Court affirmed that decision. *See Ex parte Maples*, 758 So. 2d 81, 85 (Ala. 1999).

Relief from Judgment pursuant to Ala. R. Crim. P. 32.1(f).[3] At the time, Mr. Maples was represented by attorneys from Sullivan & Cromwell of New York, New York and by John G. Butler of Huntsville, Alabama. The Sullivan & Cromwell attorneys represented Mr. Maples *pro bono publico*, and Mr. Butler appeared only to move for the *pro hac vice* admission of the two New York lawyers handling the matter.[4]

The Alabama trial court allowed Mr. Maples's petition for post-conviction relief to sit unresolved for almost two years. The court refused to schedule the requested evidentiary hearing and did not rule on the merits.[5]

During the interim, Mr. Maples periodically met with his lawyers. During those sessions, Mr. Maples specifically instructed his counsel to appeal any denial of his pending petition and counsel specifically assured Mr. Maples that they would do so. *See* Appendix C.

On May 22, 2003, the Alabama court summarily denied Mr. Maples's Rule 32 Petition. The Court's order was mailed to counsel of record.[6] In the almost two years between the filing of Mr. Maples's Petition and its denial, the two Sullivan

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3. Among other things, Mr. Maples's Rule 32 Petition raised Sixth Amendment claims of ineffective assistance of counsel at trial and sentencing.

4. Sullivan & Cromwell associates Clara Ingen-Housz and Jaasi Munaanka were counsel of record in the matter along with Mr. Butler.

5. Mr. Maples requested a full evidentiary hearing at the time he filed his Rule 32 Petition.

6. The court did not send Mr. Maples a copy of the Order.

& Cromwell lawyers who were counsel of record had left the firm. The envelopes containing their copies of the May 23, 2003 Order were returned to the Alabama court unopened, with a prominent handwritten notation on one of the envelopes: "Return to Sender – Left Firm."

Although Mr. Butler's firm received and opened his copy of the Order, Mr. Butler did nothing – assuming that his role in the case was limited to moving for the admission of the Sullivan & Cromwell attorneys and further assuming that they would handle any contemplated appeal.[7] The Court also did nothing. It did not attempt to forward the returned envelopes. It did not attempt to contact local counsel or to schedule a status conference to clear up any ambiguity concerning Mr. Maples's representation.

The State, however, was not idle. Despite knowing that Mr. Maples was represented by counsel throughout this period, the Alabama Attorney General's office waited until after the time for Mr. Maples to appeal had expired, and then contacted Mr. Maples directly and *ex parte* to inform him of that fact. The State's *ex parte* contact was the first time that Mr. Maples learned that his Rule 32 Petition had been denied and that his time to appeal had expired.

On October 8, 2003, Mr. Maples petitioned the Alabama Court of Criminal Appeals for a writ of mandamus allowing him to take an untimely appeal on the merits.[8] In support,

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7. Mr. Butler was unaware that the two attorneys at Sullivan & Cromwell had left the firm.

8. The Alabama Supreme Court has held that a writ of mandamus is the only procedure by which a criminal defendant may seek an untimely appeal from the denial of post-conviction collateral relief under Rule 32. *See Marshall v. State*, No. 1012217, 2003 WL 22221211, at * 4-5 (Ala. Sept. 26, 2003).

Mr. Maples relied heavily on federal due process grounds – citing a prior decision of the Alabama Court of Criminal Appeals, *Marshall v. State*, holding on remarkably similar facts that federal due process requires the states to allow an untimely appeal from the denial of a Rule 32 Petition. *Marshall v. State*, No. CR-01-0204, 2002 WL 1141511, at *2 (Ala. Crim. App. May 31, 2002)[9] ("Accordingly, on the authority of *Fountain* and *Brooks* we find that regarding his out-of-time-appeal claim, Marshall is entitled to the relief requested . . ."). [10] Counsel of record submitted affidavits in support of the relief sought – affidavits establishing that Mr. Maples's appeal was untimely solely through an error of counsel and through no fault of his own.

That Mr. Maples based his mandamus petition on federal due process grounds is not seriously in dispute. As the Alabama Attorney General noted in his brief before the Court of Criminal Appeals:

> Maples' entire procedural due process argument is crafted from this Court's inapplicable holding

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9. Reversed on other grounds by *Marshall v. State*, No. 1012217, 2003 WL 22221211 (Ala. Sept. 26, 2003).

10. *Fountain* and *Brooks* in turn rested on principles of federal due process. *See Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001) ("For this denial of appellate due process, that aspect of the judgment of the Court of Criminal Appeals affirming the denial of Fountain's Rule 32 petition must be reversed, although we affirm that aspect of the judgment of the Court of Criminal Appeals affirming the grant of the out-of-time appeal."); *Brooks v. State*, No. CR-00-1134, 2002 Ala. Crim. App. LEXIS 107, at *13-14 (Apr. 26, 2002) ("An inmate's lack of notice as to when the 42-day appeal period commences, we think, is tantamount to an inmate's receiving no notice of a ruling at all, at least for purposes of satisfying the requirements of procedural due process.").

> in *Marshall* . . . Procedural due process, however, is applicable only where a party is denied his day in court because the court, acting through its clerk, assumed the duty of notifying the party of his scheduled trial date and then negligently failed to do so.

State's Brief at 7.

The Court of Criminal Appeals explicitly acknowledged the due process implications of this argument:

> Maples argues that the Supreme Court's holding in *Marshall* is applicable to this case and that he is entitled to an out-of-time appeal because the time for filing an appeal expired through no fault of his own without an appeal being filed. The State argues that the holding in *Marshall* does not apply to this case because "Procedural due process . . . is applicable only where a party is denied his day in court because the court, acting through its clerk, assumed the duty of notifying the party of his scheduled trial date and then negligently failed to do so."

Ex parte Maples, No. CR-03-0021, 2004 WL 102861, at 1 (Ala. Crim. App. Jan. 23, 2004).

In response, the Alabama Attorney General argued that *Marshall* is distinguishable because the defendant in that case was not represented by counsel. According to the Attorney General, *Marshall* is unlike this case because *Marshall* did not involve an error of counsel. The Alabama Court of Criminal Appeals agreed, distinguished *Marshall* on that

basis, and held that an error of counsel even in these circumstances is insufficient to allow an untimely appeal on due process grounds *See id.* at *5 ("Maples has failed to show that his right to procedural due process was violated.").

Marshall itself, however, does not make clear whether the defendant in that case was represented by counsel or not (and therefore whether – as here – the appeal was untimely due to an error of counsel). Accordingly, counsel in this case sent a team to Alabama to pull the court records and determine whether the Alabama Attorney General (n.b., a party in *Marshall* both to the original Rule 32 proceeding and to the relevant appeals) had distinguished the case appropriately.

On February 6, 2004, Mr. Maples sought a writ of certiorari from the Alabama Supreme Court.[11] During the course of those proceedings, counsel for Mr. Maples discovered that: (1) the defendant in *Marshall* had in fact been represented by counsel (both at the time his original Rule 32 Petition was denied and when his time to appeal expired); (2) Marshall's counsel had been mailed a copy of the relevant order; and (3) Marshall's counsel – as here – had failed to appeal.[12] These new facts, rendering *Marshall* indistinguishable from the present case, were brought before the Alabama Supreme Court by letter brief on June 28, 2004. *See* Appendix C.

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11. Mr. Maples's mandamus petition before the Alabama Supreme Court similarly preserved his due process challenge – explicitly referring to the due process clause of the 14th Amendment and arguing that due process requires the states to allow an untimely appeal in these circumstances.

12. White & Case personnel Cecilia M. Bidwell and Robert M. Fojo discovered these facts on June 21, 2004 — after the parties had submitted their briefs to the Alabama Supreme Court.

On September 4, 2004, the Alabama Supreme Court issued a *per curiam* summary decision with one dissent denying Mr. Maples an out-of-time appeal. *See* Appendix A. This Petition follows.

REASONS FOR GRANTING THE PETITION

I. In Direct Conflict With the Opinion Below, the Supreme Court of Florida Has Held That Federal Due Process Requires the States to Allow an Untimely Appeal from the Denial of State Post-Conviction Relief Where That Appeal is Untimely Solely Through an Error of Counsel and in Disregard of Specific Instructions from a Capital Defendant.

According to the Supreme Court of Florida, federal due process requires the states to allow an untimely appeal from the denial of state post-conviction relief where (as here) the appeal was untimely solely through an error of counsel and in disregard of specific instructions from a capital defendant. *See Williams v. State*, 777 So. 2d 947 (Fla. 2001).[13] In *Williams*, a defendant sought an untimely appeal from the denial of his collateral motion for post-conviction relief. In support, the defendant noted that counsel had ignored his specific instructions to appeal should the petition be denied.

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13. Further establishing the settled nature of the conflict supporting certiorari in this case, the Supreme Court of Tennessee in *Stokes v. State*, 146 S.W.3d 56 (Tenn. 2004), has held that a defendant "is not denied due process by his post-conviction counsel's failure to either withdraw as counsel or file [a timely] application for permission to appeal . . ." *Stokes*, 146 S.W.3d at 62. Although *Stokes* did not involve an untimely appeal in the face of a capital defendant's specific instructions and assurances to the contrary (as here), *Stokes* nonetheless applies a more narrow view of due process than *Williams*.

Id. at 949. The Florida Supreme Court held that federal due process requires the states to allow an untimely appeal in such circumstances. *See id.* at 950. As the court held:

> [D]efendant can file a belated appeal of the trial court's denial of a rule 3.850 or rule 3.800 motion due to counsel's neglect.

Id. (internal quotations omitted).[14]

The Florida Supreme Court based its *Williams* holding on its prior decision in *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999). *See id.* at 950-51. In *Steele*, the court held that federal due process requires the states to allow a defendant to file an untimely petition for post-conviction relief where counsel negligently fails to file the petition within the applicable statute of limitations despite an oral promise to do so. *Steele*, 747 So. 2d at 934. Although *Steele* involved an untimely petition for post-conviction relief, rather than a belated appeal from the denial of such relief, the Supreme Court of Florida found the same federal due process rights to be implicated:

> We find the state's attempt to distinguish *Steele* unavailing: If a defendant potentially can file a belated [motion for post-conviction relief] due to counsel's neglect, it should follow that the defendant can file a belated appeal of the trial court's denial of a [motion for post-conviction relief] due to counsel's neglect.

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14. Florida Rules of Criminal Procedure 3.800 and 3.850 are grounds for state collateral review – analogous to Alabama Rule of Criminal Procedure 32 at issue in this case.

Williams, 777 So. 2d at 950 (internal quotations and citations omitted).

II. In Conflict with the Opinion Below, the Supreme Courts of Arkansas, Florida and Mississippi Have Held That Federal Due Process Requires the States to Allow an Untimely Petition for State Post-Conviction Relief Where The Petition Is Untimely Solely Through an Error of Counsel.

In *Porter v. State*, the Arkansas Supreme Court held that due process can require the states to allow an untimely petition for collateral post-conviction relief:

> [W]hile there is no constitutional right to a post-conviction proceeding, when a State undertakes to provide collateral relief, due process requires that the proceeding be fundamentally fair. Here, the question becomes whether it is fundamentally fair to require an inmate on death row to abide by stringent filing deadlines when he was under the impression he was represented by counsel and that counsel was timely filing the proper pleadings.

Porter v. State, 2 S.W.3d 73, 75 (Ark. 1999) (internal quotations and citations omitted). In *Porter*, the defendant had been represented by counsel at the time his petition was denied and when his time to appeal expired. *Id.* at 75-76. Based on those facts, the court concluded:

> In light of the fact that this is a case involving the death penalty and the fact that Rule 37.5 has in effect cured the instant situation from recurring, coupled with the ambiguous circumstances

> surrounding appellant's legal representation, and the requirements of due process, we hereby hold that fundamental fairness, *in this narrowest of instances where the death penalty is involved*, dictates an exception in the present matter to allow appellant to proceed with his [untimely] Rule 37 petition.

Id. at 76 (emphasis in original).

As noted above, in *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999), the Florida Supreme Court held that due process entitles a defendant to file an untimely petition for collateral review if the defendant missed the deadline "because his or her attorney had agreed to file the motion but failed to do so in a timely manner" *Id.* at 934. As the court noted, post-conviction remedies "are subject to the more flexible standards of due process announced in the Fifth Amendment [to the] Constitution of the United States." *Id.*

In *Puckett v. State*, 834 So. 2d 676 (Miss. 2002), the Supreme Court of Mississippi considered whether to allow an untimely petition for collateral post-conviction relief. The court held that due process requires the states to allow an untimely petition "when a party is prohibited from exercising his right to proceed by circumstances which are clearly beyond his control and rise to such a dimension as to implicate due process and fundamental fairness." *Id.* at 678.[15]

---

15. The court in *Puckett* based its holding on principles of due process rather than a right to effective assistance of counsel. *Puckett*, 834 So. 2d at 678. Although Mississippi affords capital defendants a right to counsel in collateral proceedings, it also imposes a statutory deadline on the filing of petitions for post-conviction relief. *See id.* at 677.

III. This Court Should Grant Certiorari Because the Opinion Below Implicates Important Constitutional Rights – the Right to Due Process and the Right of Access to the Courts.

This Court previously has held that the United States Constitution does not guarantee a right to effective assistance of counsel in state collateral proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 752-57 (1991); *Murray v. Giarratano*, 492 U.S. 1, 8-10 (1989). An error of counsel, however, can be so fundamental as to deny a capital defendant fair access to the courts. As the Second Circuit has noted, a party without a Sixth Amendment right to counsel may nonetheless be denied due process by counsel's failure to seek collateral relief when instructed to do so. *See Rabiu v. INS*, 41 F.3d 879, 882-84 (2d Cir. 1994).

Here, counsel not only failed to file a timely appeal, but did so in direct violation of specific instructions from the defendant to appeal and specific assurances from counsel that an appeal would be taken. In such circumstances, federal due process requires the states to allow an untimely appeal and thereby provide fundamental fairness to those who seek access to the judicial process.

CONCLUSION

For the reasons set forth above, Petitioner Cory R. Maples respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF ALABAMA DENYING PETITION FOR WRIT OF MANDAMUS DATED SEPTEMBER 3, 2004

IN THE SUPREME COURT OF ALABAMA

September 3, 2004

1030701

Ex parte Cory R. Maples. PETITION FOR WRIT OF MANDAMUS: CRIMINAL (In re: State of Alabama v. Corey Maples) (Morgan Circuit Court: CC-95-842.60; Criminal Appeals: CR-03-0021).

ORDER

IT IS ORDERED that the petition for writ of mandamus in this cause is denied.

Petition Denied.

LYONS, J., - Nabers, C.J., and Houston, Brown, Harwood, Woodall, and Stuart, JJ., concur. Johnstone, J., dissents.

s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX B — OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA DATED JANUARY 23, 2004

Court of Criminal Appeals of Alabama.

CR-03-0021.

Ex parte Cory R. MAPLES.
(In re State of Alabama

v.

Corey Maples[1]).

Jan. 23, 2004.

PER CURIAM.

The petitioner, Cory R. Maples, filed this petition for a writ of mandamus requesting an out-of-time appeal from the denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P. In 1997, Maples was convicted of capital murder for the murder of Stacy Alan Terry and Barry Dewayne Robinson II pursuant to one course of conduct and for the murder of Stacy Alan Terry during the course of a robbery. The jury, by a vote of 10 to 2, recommended that Maples be sentenced to death. Maples's convictions and sentence of death were affirmed on direct appeal. See *Maples v. State*, 758 So. 2d 1 (Ala. Crim. App.), *aff'd*, 758 So. 2d 81 (Ala. 1999).[2]

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1. The petition filed in this Court was styled "Cory" Maples; however, the petitioner's name on the circuit court's records is spelled "*Corey*" Maples.

2. This Court, in an 80-page opinion, addressed 33 issues on Maples's direct appeal.

Appendix B

In August 2001, Maples filed a Rule 32, Ala. R. Crim. P., petition attacking his conviction and death sentence. On May 22, 2003, Judge Glenn Thompson denied that petition. On May 23, 2003, the circuit clerk mailed copies of the order denying the petition to the Alabama attorney general's office and to Maples's attorneys—Alabama attorney John G. Butler and New York attorneys Clara Ingen-Housz and Jaasi Munanka. The notices sent to the New York attorneys were returned to the circuit clerk's office. On the outside of one of the envelopes were handwritten the words "Left Firm." It is undisputed that Maples's Alabama attorney received the timely notice that the Rule 32 petition had been denied.

In August 2003, Maples's mother contacted the New York law firm of Sullivan & Cromwell, the firm at which his New York attorneys were associates, and informed them that the Alabama attorney general's office had notified her son that his Rule 32 petition had been denied and that the time for filing an appeal had expired. Felice Duffy, an associate with Sullivan & Cromwell, investigated and discovered that Maples's petition had been dismissed in May 2003. Duffy and two other associates with Sullivan & Cromwell filed a motion in the circuit court seeking to have Judge Thompson reissue his May 22, 2003, order denying the Rule 32 petition so that they could file a timely notice of appeal. Judge Thompson denied that motion.

Twenty-three days after Judge Thompson denied the motion to reissue the order denying the petition, the Alabama Supreme Court released *Marshall v. State*, [Ms. 1012217, September 26, 2003] __ So. 2d __ (Ala. 2003). Based on the Supreme Court's holding in *Marshall*—that a writ of mandamus

Appendix B

Supreme Court's holding in *Marshall*—that a writ of mandamus is the only method by which to obtain an out-of-time appeal from the denial of a Rule 32 petition—Maples filed this petition for a writ of mandamus requesting that we grant him an out-of-time appeal.

Maples argues that the Supreme Court's holding in *Marshall* is applicable to this case and that he is entitled to an out-of-time appeal because the time for filing an appeal expired through no fault of his own without an appeal being filed. The State argues that the holding in *Marshall* does not apply to this case because "Procedural due process . . . is applicable only where a party 'is denied his day in court because the court, acting through its clerk, assumed the duty of notifying the party of his scheduled trial date and then negligently failed to do so.' " (State's brief at p. 7, quoting *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992)). The State further argues that Maples's attorneys had a duty to monitor the status of his Rule 32 petition and that they failed to do so.

Judge Thompson's order denying the motion to reissue the order denying the petition stated:

> "The petitioner, Corey R. Maples, has filed a Motion to Reissue the Court's May 22, 2003, Order denying the Petitioner's Rule 32 petition. On August 1, 2001, the petitioner, through his counsel Clara Ingen-Housz and Jaasi Munanka, together with local counsel, John G. Butler, Jr., filed a Rule 32 petition with the Circuit Court requesting post-conviction relief for the petitioner,

Appendix B

Corey R. Maples. On May 22, 2003, the Circuit Court of Morgan County entered an order denying the petitioner's Rule 32 relief. On May 23, 2003, the Clerk of the Circuit Court, John Pat Orr, mailed copies to all of the attorneys of record at the addresses provided by each attorney. Included on that list were attorneys Clara Ingen-Housz and Jaasi Munanka at 125 Broadway Street, New York, New York 10004-2498, as well as local counsel John G. Butler. The Court received the copy sent to Jaasi Munanka as 'Return to Sender—Attempted Unknown' and the copy sent to Clara Ingen-Housz marked 'Return to Sender—Attempted Not Known' and written in longhand is 'Return to Sender—Left Firm.'

"Counsel Munanka and Ingen-Housz were both admitted pro hac vice on November 5, 2001, and entered appearances of record for the petitioner. John G. Butler is licensed to practice in the State of Alabama. The petitioner's new counsel with the same firm, Sullivan and Cromwell, L.L.P., are asking this Court to vacate its May 22, 2003, order and enter a new order denying the petitioner's Rule 32 petition. To do so would perpetrate subterfuge on the appellate court.

"A review of the file shows John G. Butler, Jr., did in fact get served. Jaasi Munanka and Clara Inga-Housz apparently have left the firm of Sullivan and Cromwell, although they have not withdrawn from the Corey Maples' case and now

lawyers Marc De Leeuw, Felice Duffy, and Cathy Brewer are of counsel for the petitioner, Corey Maples. De Leeuw, Duffy, and Brewer apparently work at the same law firm of Sullivan and Cromwell in New York, New York, and have not yet been admitted to practice in Alabama, [and,] therefore, have not entered appearances as attorneys of record to the Clerk of this Court because they have not yet been admitted. Other than the fact that the most recent mailings to attorneys Ingen-Housz and Munanka have been returned by the post office as 'Attempted—Unknown' they are still attorneys of record for the petitioner. How can a Circuit Clerk in Decatur, Alabama, know what is going on in a law firm in New York, New York? The Clerk mailed copies to the attorneys of record—who remain attorneys of record, and mailed copies to the local lawyer. What counsel for the petitioner is in effect doing is allowing this Court to permit an out-of-time appeal. This Court is unwilling to enter into subterfuge in order to gloss over mistakes made by counsel for the petitioner. If the petitioner is entitled to an out-of-time appeal, let the Court of Appeals so rule.

"Counsel for the petitioner have cited several cases in defense of their position. Most notable are *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001), *Ex parte Miles*, 841 So. 2d 242 (Ala. 2002), and *[Ex parte] Robinson*, 865 So. 2d 1250 (Ala. Crim. App. 2003). These cases can be

> distinguished from the case at hand because they involved pro se defendants who never received notice of the outcome of their Rule 32 petitions because the Court failed to take the necessary action to notify the defendant. The petitioner in this instance is represented by several lawyers. The Circuit Clerk mailed notices to these lawyers at their listed addresses. Despite the fact that two of the packets were returned, the petitioner's local counsel did in fact receive notice. As a result, there is no evidence that the Court committed error or neglect in handling this matter."

Maples relies on *Marshall* in support of the issuance of the writ of mandamus. The Alabama Supreme Court in *Marshall*, clarified that a writ of mandamus is the only means by which to secure an out-of-time appeal from the denial or dismissal of a Rule 32 petition. The *Marshall* Court, finding that the circuit clerk had failed to provide Marshall, who was proceeding pro se, notification of the denial of his Rule 32 petition, stated:

> "In *Ex parte Johnson*, [806 So. 2d 1195 (Ala. 2001),] this Court found that Bonnide Johnson 'was not notified that his Rule 32 petition was denied'— even though he 'asked, through the office of the circuit clerk, that he be notified of material developments in his case'—'and the 42-day period during which he could have appealed that denial has expired.' 806 So. 2d at 1197. This Court relied upon and quoted *Ex parte Weeks*, [611 So. 2d 259 (Ala. 1992),] in which this Court stated:

> " ' "Although it is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se, and that, as a general rule, no duty rests upon either the court or the opposing party to advise that party of his scheduled trial date, see the cases collected at 18A Ala. Digest *Trial* § 9(1)(1956), a party's right to procedural due process is nonetheless violated if he is denied his day in court *because the court, acting through its clerk, assumed the duty of notifying that party of his scheduled trial date and then negligently failed to do so.*' "
>
> "806 So. 2d at 1197 (quoting *Ex parte Weeks*, 611 So. 2d at 262) (emphasis added). This Court in *Ex parte Weeks* made it clear that procedural-due-process concerns arose when the court assumed a duty of notification it did not otherwise owe the petitioner and then failed to perform that duty."

__ So. 2d at __. The holding in *Weeks* has been narrowly applied. A writ of mandamus has issued only in similar fact situations when there was evidence indicating that the circuit clerk failed to mail notification that the Rule 32 petition had been denied. See *Marshall*, supra; *Ex parte Miles*, 841 So. 2d 242, 244 (Ala. 2002) (inmate did not receive notice of denial of petition and "to not allow Miles an opportunity to file a notice of appeal under these circumstances would violate his clear legal right to procedural due process"); *Ex parte Johnson*, 806 So. 2d 1195 (Ala. 2001) (inmate did not receive notification of denial of Rule 32 petition so writ of mandamus issued).

Appendix B

In *Ex parte Swoope*, 724 So. 2d 92, 95-96 (Ala. Crim. App. 1998), we recognized the long-standing Alabama rule that a party has a duty to monitor the status of his or her case. We stated:

> "It is the policy of the judicial system of this state that an accused has a duty to monitor the status of his case. *Ex parte Weeks*, 611 So. 2d 259 (Ala. 1992). This policy was discussed in *Hart v. City of Priceville*, 631 So. 2d 301 (Ala. Cr. App. 1993):
>
> > " ' "[I]t is generally held in Alabama that a party is under a duty to follow the status of his case, whether he is represented by counsel or acting pro se, and that, as a general rule, no duty rests upon either the court or the opposing party to advise that party of his scheduled trial date, see the cases collected at 18A, Ala. Digest *Trial* § 9(1) (1956)." *Ex parte Weeks*, 611 So. 2d 259, 262 (Ala. 1992). "Generally, a party, whether represented by counsel or acting pro se, has a duty to keep abreast of the status of his case, and no duty rests on the court or opposing parties to advise him of the trial date." *Bowman v. Slade*, 501 So. 2d 1236 (Ala. Civ. App. 1987).' "

See also *Johns v. A.T. Stephens Enters., Inc.*, 815 So. 2d 511, 515 (Ala. 2001) (" '[A]ll parties litigant, once in court, either for themselves or through their attorneys[,] must keep track of their case, [and] know [its] status. . . .' "); *Averett*

v. Averett, 255 Ala. 606, 610, 52 So. 2d 371, 375 (1951) (" 'A litigant by his attorney must keep up with the progress of his case in court, and he is not due to have notice, except as prescribed by law.' "); *Faust v. Faust*, 251 Ala. 60, 36 So. 2d 229 (1948); *Wetzel v. Birmingham Elec. Co.*, 250 Ala. 267, 268, 33 So. 2d 882, 882 (1948) ("As the aggressive party in the case it was plaintiff's duty to follow his case in all of its steps until finally disposed of and no duty rested upon the court or its officers or the adverse party to advise plaintiff of the setting of the case for trial."); *Thompson v. Odom*, 279 Ala. 211, 184 So. 2d 120 (Ala. 1966); *State v. Woodham*, 276 Ala. 662, 166 So. 2d 391 (1964). Alabama is not alone in recognizing this policy. See *Vilsick v. Fibreboard Corp., et al.*, 861 S.W.2d 659, 664 (Mo. Ct. App. 1993) ("A party has a continuing duty to monitor a case from the filing of the case until final judgment."); *Blichert v. Brososky*, 436 N.E.2d 1165, 1168 (Ind. Ct. App. 1982) ("When an attorney appears in court for a client, it becomes his duty to keep advised of the progress of the case."); *Oklahoma Bar Ass'n v. Braswell*, 663 P.2d 1228 (Okla. 1983) (attorney has duty to monitor status of case). Cf. *Kawazoe v. Davila*, 849 S.W.2d 906 (Tex. App. 1993) (will not impose on layman duty to monitor the status of his case).

The duty to monitor the status of one's case necessarily includes the duty to notify the circuit clerk of any change of address. Here, Maples was represented by three attorneys. Because Maples was represented by attorneys, all correspondence from the circuit clerk was directed to the attorneys. See Rule 34.4, Ala. R. Crim. P. We take judicial notice that every county and circuit has its own method of notifying parties of significant dates in their pending cases.

Appendix B

See *D. & J. Mineral & Mining, Inc. v. Wilson*, 456 So. 2d 1099, 1101 (Ala. Civ. App. 1984) ("This court takes judicial note that the different bars and judicial circuits, even different judges, establish methods and customs of handling court business such as publishing court dockets, granting continuances and giving notice to attorneys."). The circuit clerk here assumed a duty to notify the parties of the resolution of Maples's Rule 32 petition. However, the circuit clerk did not act negligently in failing to locate Maples's New York attorneys after their notifications were returned because the two attorneys had left the law firm with which they had been associated and had not provided the circuit clerk with a current address.[3]

Attorneys Clara Ingen-Housz and Jaasi Munanka, both attorneys licensed by the State of New York, applied for and were granted pro hac vice status to represent Maples. Rule VII, Rules Governing Admission to the Alabama State Bar. To be admitted pro hac vice, an out-of-state attorney must associate a local attorney. Here the local attorney was John Butler. Butler stated in his affidavit that is included in the exhibits submitted to this Court that he was given notice of the

---

3. We quote with approval the words of the Indiana Court of Appeals:

> "The law imposes a duty upon attorneys to exercise due diligence by regularly checking court records to ascertain the status of pending cases. . . . When an attorney appears in court for a client, it becomes his duty to keep advised of the progress of the case."

Blichert v. Brososky, 436 N.E.2d 1165, 1168 (Ind. Ct. App. 1982).

dismissal of the Rule 32 petition. Rule VII.C., Rules Governing Admission to the Alabama State Bar, provides: "Local counsel associating with a foreign attorney in a particular case shall thereby accept joint and several responsibility with the foreign attorney to the client, to opposing parties and counsel, and to the court or administrative agency in all matters arising from that particular cause."

The Alabama Supreme Court in *Thomas v. Kellett*, 489 So. 2d 554, 555 (Ala. 1986), held that when one attorney has received notification of a trial date, and cocounsel did not, "the trial court's notification of [one attorney representing a party] and not [the other attorney representing the same party] concerning certain trial matters was sufficient to give notice to both in light of their apparent co-counsel status."

We agree with Judge Thompson that the circuit clerk was not negligent in its duty to notify the parties of the resolution of the Rule 32 petition. Maples has failed to show that his right to procedural due process was violated. In order for a writ of mandamus to issue the petitioner must establish: (1) a clear legal right to the relief sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) no adequate remedy at law; and (4) the properly invoked jurisdiction of the reviewing court. See *State v. Williams*, 679 So. 2d 275 (Ala. Crim. App. 1996). Maples has failed to establish the first of the four prerequisites.[4]

---

4. We note that Maples has filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama.

Appendix B

For the foregoing reasons, this petition is due to be, and is hereby, denied.

PETITION DENIED.

McMILLAN, P.J., and COBB, BASCHAB, SHAW, and WISE, JJ., concur.

APPENDIX C — SUPPLEMENTAL LETTER BRIEF TO THE ALABAMA SUPREME COURT DATED JUNE 28, 2004

WHITE & CASE
LIMITED LIABILITY PARTNERSHIP

WACHOVIA FINANCIAL CENTER, SUITE 4900
200 SOUTH BISCAYNE BOULEVARD
MIAMI, FLORIDA 33131-2352

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June 28, 2004

VIA FEDEX

Hon. Chief Justice
and the Associate Justices of the Alabama Supreme Court
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, AL 36104-3741

Re: *Ex parte Maples*, Case No. 1030701

Your Honors:

This will respond to the June 24, 2004 letter to this Court from Assistant Attorney General James R. Houts.

Appendix C

It is undisputed that the Attorney General's office misled this Court on a key point of substantive law. Although Mr. Houts wrote this Court purportedly to correct that error, he instead used his error as an opportunity for further argument (and, in doing so, to mischaracterize the law further).[1]

In its original brief, the Attorney General's office attempted to distinguish the key decision of *Marshall v. State*, 2002 WL 1141511 (Ala. Crim. App. May 31, 2002). In *Marshall*, the Court of Criminal Appeals allowed a defendant's untimely Rule 32 petition to be heard on the merits (precisely the relief that Mr. Maples seeks here). Mr. Marshall, like Mr. Maples, was unaware of the trial court's denial of his original petition and did not seek timely review of that decision. The Court of Criminal Appeals held that Mr. Marshall's failure to seek timely review was through no fault of his own and therefore was willing to allow review on the merits.

In this case, the Attorney General's office (and the court below) attempted to distinguish *Marshall* on the grounds that Mr. Maples was represented by counsel at the time his Rule 32 petition was denied, that counsel received notice of the Court's action, and, therefore, that counsel's failure to seek timely review should be imputed to Mr. Maples. State's Response Brief at 7 (arguing that "in *Marshall* I the defendant had appeared pro se" and therefore "[t]he fact that Maples's local counsel received the order [ ] completely removes this case from the court's rationale in *Marshall*"); *see also Maples*

1. Mr. Houts only agreed to write to this Court after Mr. Maples's defense team traveled to Alabama and discovered court records establishing the State's error.

v. State, No. CR-03-0021, 2004 WL 102861, at *3, *4 (Ala. Crim. App. Jan. 23, 2004) (noting that "Maples relies on *Marshall* in support of the issuance of a writ of mandamus," that Marshall, unlike Maples, was "proceeding pro se" because "[h]ere, Maples was represented by three attorneys."). The Attorney General's office essentially argued that Mr. Marshall (unlike Mr. Maples) had proceeded pro se and therefore had no counsel whose negligence could be imputed to him. *Id.*

Court records, however, now establish that both the Attorney General's office and the court below were just plain wrong when they distinguished *Marshall* from this case on the grounds that Mr. Maples was represented by counsel, whereas Mr. Marshall was not.[2] ***The simple fact is that Mr. Marshall (like Mr. Maples) was represented by counsel both at the time his Rule 32 petition was denied and at the time his deadline to seek review of that decision expired.***

Both *Marshall* and this case therefore involve an error of counsel. Consistent with this Court's precedent allowing

2. Mr. Houts seeks to obscure this distinction by arguing that Mr. Marshall had some sort of dual pro se/represented status. State's Letter at 1. Yet, this misses the point entirely. When Mr. Marshall's Rule 32 petition was denied and his time to seek review expired, he was either represented by counsel or not.

Mr. Marshall (like Mr. Maples) was in fact represented throughout this period. Accordingly, *Marshall*'s focus on whether the defendant was notified personally is important only if a failure to do so would establish that the untimeliness of the review was — in the words of the rule — "through no fault of his own." Ala. R. Crim. P. 32.1(f).

untimely direct appeals where counsel (rather than a litigant) is responsible for the error, *Marshall* allowed merits review of a Rule 32 proceeding where the defendant failed to seek timely review through no fault of his own. *See, e.g., Wright v. State*, 845 So. 2d 836, 839 (Ala. Crim. App. 2001) (petitioner entitled to an out-of-time appeal if counsel erred by failing to appeal within the prescribed time); *Johnson v. State*, 848 So. 2d 282, 283 (Ala. Crim. App. 2002 (same); *see also Clayton v. State*, 867 So. 2d 1150, 1152 (Ala. Crim. App. 2003) (petitioner entitled to an out-of-time appeal where counsel failed to seek timely review after being instructed to do so); *Seay v. State*, 2003 WL 586713, at *2 (Ala. Crim. App. Feb. 28, 2003) (petitioner entitled to an out-of-time appeal where counsel represented that he would appeal and failed to do so).[3]

Rather than acknowledge the State's error and simply argue that *Marshall* was wrongly decided, Mr. Houts instead seeks to distinguish *Marshall* on other grounds. Yet, the reasoning of the State's original brief itself now establishes that *Marshall* should dispose of this case.

According to the State, *Marshall* based its holding on the fact that "[n]othing in the circuit court's order indicates that the circuit court ever notified Marshall of the dismissal of his first Rule 32 petition." State's Response Brief at 7-8. In the State's own words, therefore, *Marshall* turned on the fact that the trial court never personally notified Marshall — ***a represented***

3. Here, it is undisputed that Mr. Maples specifically requested that his counsel seek review of each adverse decision in the Alabama courts. It is also undisputed that Mr. Maples's counsel (including the undersigned) told Mr. Maples that counsel would in fact seek review of each adverse decision.

defendant — of the dismissal of his Rule 32 petition. *Id.* Absent such personal notice, neither Mr. Marshall nor Mr. Maples should be held liable for his counsel's error.[4]

Respectfully yours,

s/ Kathy E. Brewer
Kathy E. Brewer

KEB:lo

cc: Assistant Attorney General James R. Houts
Hon. Glenn E. Thompson

4. According to Mr. Flouts, *Marshall* somehow instead stands for "the proposition that where a prisoner is represented by an attorney in a collateral proceeding, that attorney's mistakes cannot be attributed to the State." State's Letter at 2. Yet, Marshall stands for just the opposite proposition — where a defendant is represented by counsel, wishes to seek timely review, but fails to do so "through no fault of his own," then the State cannot preclude review on the merits unless it can show that the defendant was personally aware of his right to appeal.

No. 04-765

In the

Supreme Court of the United States

CORY R. MAPLES,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Alabama

BRIEF OF THE STATE OF ALABAMA IN OPPOSITION TO THE PETITION

Troy King
Attorney General

Kevin C. Newsom
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Office of the Attorney General
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Montgomery, Alabama 36130-0152
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January 5, 2005

CAPITAL CASE

QUESTION PRESENTED

Whether this Court should grant a writ of certiorari to determine whether Fourteenth Amendment of the United States Constitution entitles Maples to a state writ of mandamus allowing him an out-of-time appeal from the denial of his state postconviction petition?

PARTIES

The caption contains the names of all parties in the courts below.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama denying Maples's petition for a writ of mandamus is unreported and reproduced in petitioner's brief at Appendix A. The published opinion of the Alabama Court of Criminal Appeals denying Maples's petition for a writ of mandamus is found at *Ex parte Maples*, No. CR-03-0021, 2004 WL 102861 (Ala. Crim. App. Jan. 23, 2004), and is reproduced in petitioner's brief at Appendix B.

STATEMENT OF JURISDICTION

The State of Alabama submits that this Court does not have jurisdiction under 28 U.S.C. § 1257 to review the Supreme Court of Alabama's denial of Maples's petition for a writ of mandamus. Subsection 1257(a) states in pertinent part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari ...where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." 28 U.S.C. § 1257(a). The Supreme Court of Alabama reviewed *de novo* Maples's petition for a writ of mandamus under Rule 21(e)(1) of the Alabama Rules of Appellate Procedure, in which Maples requested an out-of-time appeal; the state supreme court determined that Maples was not entitled to that extraordinary state remedy. There is no right to a writ of mandamus under Rule 21 of the Alabama Rules of Appellate Procedure "specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." *See id.* Because there are no federal constitutional considerations incident to the Supreme Court of Alabama's application of a state procedural rule that dictates when a state writ of mandamus may issue, this Court does not have jurisdiction.

STATEMENT OF THE CASE

Cory Maples was convicted of two counts of capital murder and sentenced to death for the intentional murders of Stacy Alan Terry and Barry Dewayne Robinson, II. *Maples v. State*, 758 So. 2d 1, 14 (Ala. Crim. App. 1999). On March 26, 1999, the Alabama Court of Criminal Appeals affirmed Maples's conviction and sentence of death. *Id.* After the Alabama Court of Criminal Appeals denied Maples's application for rehearing, the Supreme Court of Alabama affirmed his conviction and sentence. *Ex parte Maples*, 758 So. 2d 81 (Ala. 1999).

On August 1, 2001, Maples filed a petition for postconviction review in the trial court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure collaterally attacking his conviction and death sentence. *Ex parte Maples*, 885 So. 2d 845, 846 (Ala. Crim. App. 2004). Clara Ingen-Housz and Jaasi Munanka of the law firm of Sullivan & Cromwell in New York City were admitted *pro hac vice* to represent Maples in his Rule 32 proceeding. Although Ingen-Housz and Munanka were the only Sullivan & Cromwell attorneys admitted *pro hac vice* to represent Maples in Alabama, a number of other attorneys from that firm assisted in Maples's representation. (Maples's petition for Writ of Mandamus to Supreme Court of Alabama exhibit A) Along with the New York lawyers, John G. Butler, an Alabama lawyer, represented Maples as local counsel. *Ex parte Maples*, 885 So. 2d at 846.

On May 22, 2003, the trial court denied Maples's petition. *Id.* The following day, the court clerk mailed copies of the order denying the petition to Maples's attorneys Ingen-Housz, Munanka, and Butler at the addresses they provided to the court. *Id.* at 846-47. Maples's Alabama attorney received the notice that the petition had been denied. The notices sent to Maples's New York attorneys, both of whom had failed to inform

the trial court or the court clerk that they had left the firm and were no longer at the addresses that they provided, were returned to the court clerk; one had "return to sender - left firm" hand written on the envelope. *Id.* Maples's local attorney took no action and made no effort to contact Maples's New York attorneys at Sullivan & Cromwell regarding the trial court's order. (Maples's petition for Writ of Mandamus to Supreme Court of Alabama exhibit B) As a result, Maples failed to file a notice of appeal within the time limit required by the Alabama Rules of Appellate Procedure.

Thereafter, three associates at Sullivan & Cromwell filed a motion in the trial court requesting the court reissue its order disposing of Maples's petition, thus allowing them to then file a timely notice of appeal. *Ex parte Maples*, 885 So. 2d at 846. That motion was denied.[1] *Id.* Then, on October 8, 2003, pursuant to Rule 21 of the Alabama Rules of Appellate Procedure, Maples filed a petition for a writ of mandamus in the Alabama Court of Criminal Appeals requesting that court to order the trial court to allow an out-of-time appeal of the denial of his Rule 32 petition. The petition alleged that procedural due process required that court to grant Maples a writ of mandamus allowing him an out-of-time appeal of the denial of his state postconviction petition. On January 23, 2004, the Alabama Court of Criminal Appeals denied Maples's petition for a writ of mandamus. *Id.* at 850.

Maples did not petition the Supreme Court of Alabama for certiorari from the Court of Criminal Appeals. Instead, on February 6, 2004, Maples submitted substantially the same petition for a writ of mandamus to

---

[1] In *Marshall v. State*, the Supreme Court of Alabama held "that a writ of mandamus is the only method by which to obtain an out-of-time appeal from the denial of a Rule 32 petition. ..." *Ex parte Maples*, 885 So. 2d at 846; *Marshall v. State*, 884 So. 2d 900, 905 (Ala. 2003).

the Supreme Court of Alabama for *de novo* review pursuant to Rule 21 (e) of the Alabama Rules of Appellate Procedure. On September 4, 2004, the Supreme Court of Alabama denied Maples's petition for a writ of mandamus without opinion stating, "It is ordered that the petition for writ of mandamus in this cause is denied." (Petitioner's Brief Appendix A)

So, again, to be clear, Maples did not seek a writ of certiorari in the Supreme Court of Alabama under Rule 39 of the Alabama Rules of Appellate Procedure, as he alleges to this Court. (Petitioner's Brief at 7) Instead, he resubmitted his petition for a writ of mandamus to the Supreme Court of Alabama under Rule 21 of the Alabama Rules of Appellate Procedure. Under Rule 21(e), the Supreme Court of Alabama treats the mandamus request as an entirely new proceeding, reviews the petition *de novo*, and denied the petition in a one-sentence order.

REASONS FOR DENYING THE PETITION

Even assuming that jurisdiction exists, there are three principal reasons this Court should deny Maples's petition for writ of certiorari.

A. Maples's Petition for Certiorari Does Not Fall Within Any of the Grounds for Certiorari Enumerated in Rule 10 of the Rules of the Supreme Court of the United States and Fails to Satisfy 14 of the Rules of the Supreme Court of the United States.

Maples's petition does not fall within any of the expressed reasons for granting certiorari contained in Rule 10 of the Rules of the Supreme Court of the United States. Although Maples alleges that "[t]his Court should now grant certiorari to resolve a settled conflict between state courts of last resort over the meaning of an important federal constitutional right," (Petitioner's Brief at 2), which appears to invoke Rule 10(b), this allegation is without merit. Maples cannot definitively point to any conflict between the Supreme Court of Alabama's denial of his petition for a writ of mandamus pursuant to Rule 21 of the Alabama Rules of Appellate Procedure and the Florida Supreme Court's holding in *Williams v. State*, 777 So. 2d 947 (Fla. 2001).

Under Rule 21 of the Alabama Rules of Appellate Procedure, a petitioner must establish: "(1) a clear legal right to the [relief] sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court." *Ex parte Walker*, 675 So. 2d 408, 410 (Ala. 1996)(quoting *Ex parte Alfad, Inc.*, 586 So. 2d 889, 891 (Ala. 1991)). The Supreme Court of Alabama, reviewing Maples's petition *de novo*, denied his petition without opinion in a one-sentence order. In the face of that void, Maples cannot show which of the above elements the court found to be

lacking. Maples also cannot show that the Supreme Court of Alabama did not deny his petition for failure to follow the procedures for obtaining such a writ contained in Rule 21 of the Alabama Rules of Appellate Procedure. Therefore, Maples cannot show that the Supreme Court of Alabama held that a petitioner who fails to file a timely appeal of the denial of his postconviction petition, solely through the error of his counsel, is not entitled to a belated appeal in conflict with *Williams*. 777 So. 2d at 950-51.

Even setting aside the fact that the Supreme Court of Alabama denied Maples's request without elaboration, it remains the fact that the Alabama and Florida Courts were deciding procedural issues under separate state procedural rules regarding state law remedies. In *Williams*, the Florida Supreme Court applied Rule 3.850 of the Florida Rules of Criminal Procedure, which authorized postconviction proceedings and in its holding amended that rule. 777 So. 2d at 950. The Supreme Court of Alabama applied Rule 21 of the Alabama Rules of Appellate Procedure to determine whether Maples followed the state procedure for obtaining a writ of mandamus and was entitled to such a writ. Maples cannot show that the Supreme Court of Alabama's decision denying him an Alabama extraordinary writ conflicted with the Florida Supreme Court's determination that Williams was entitled to an untimely appeal of his Florida state law postcoviction proceeding. The Florida Supreme Court – it goes without saying – was not applying Rule 21 of the Alabama Rules of Appellate Procedure and made no determination regarding the procedure that a petitioner must follow in order to obtain a writ of mandamus or a determination of the showing that a petitioner must establish under Rule 21 in order to obtain such writ. Hence, Maples cannot show that there is a conflict between the Supreme Court of Alabama's denial of his petition for a writ of mandamus and the Florida Supreme Court's holding in *Williams*. 777 So. 2d at 950.

Additionally, Maples's petition fails to meet the requirements for a petition for a writ of certiorari specified in Rule 14 of the Rules of the Supreme Court of the United States. Rule 14 (1)(g)(i) requires a petition for a writ of certiorari to contain the method and manner in which the federal questions were raised in the state courts "and the way in which they were passed on by those courts. ..." Rule 14, *Rules of the Supreme Court of the United States.* The Supreme Court of Alabama, upon *de novo* review under Rule 21 of the Alabama Rules of Appellate Procedure, summarily denied Maples's petition for a writ of mandamus in a one-sentence order. It is impossible to determine how – or even whether – the Supreme Court of Alabama passed on any federal question when it denied Maples's petition. As noted, the Supreme Court of Alabama could very well have simply determined that Maples failed to follow the procedure for obtaining a writ of mandamus. Thus, Maples has failed to show how the Supreme Court of Alabama passed on any federal question.

Maples's petition does not fall within any of the enumerated reasons for granting a petition for a writ of certiorari contained in Rule 10 and fails to meet the requirements of Rule 14. Accordingly, certiorari should be denied.

B. This Court Should Deny Certiorari Because Maples's Claim is Without Merit.

The question Maples raises – "whether the due process clauses of the 5th and 14th Amendments to the United States Constitution require the states to permit an untimely appeal from the denial of state post-conviction relief where that appeal is untimely solely through an error of counsel..." – was for all intents and purposes foreclosed by this Court in *Coleman v. Thompson*. *See* 501 U.S. 722, 752-54 (1991).

In *Coleman*, the petitioner filed his notice of appeal of the denial of his state habeas corpus petition three days after the time limit set by the Virginia Supreme Court

had lapsed. *Id.* at 727. The Virginia Supreme Court upheld the dismissal the petitioner's appeal, as untimely. *Id.* at 727-28. Petitioner then filed a federal habeas corpus petition, raising the same issues that were in his state habeas corpus petition. *Id.* at 728. Petitioner alleged that the procedural default was the result of his attorney's error; thus, he said, it should be excused. *Id.*

This Court disagreed and held that because there is no constitutionally protected right to counsel in a postconviction proceeding, counsel is the petitioner's agent, and the petitioner must "bear the risk of attorney error" such as ignorance or inadvertence. *Id.* at 753. Thus, "where the state has no responsibility to ensure that the petitioner was represented by competent counsel ... it is the petitioner who must bear the burden of a failure to follow state procedural rules [due to attorney error]." *Id.* at 754.

This case is analogous to *Coleman*. Maples was not constitutionally entitled to counsel in his Rule 32 proceeding; therefore, under settled law, he must "bear the burden" of his attorneys' inadvertent error. *See id* at 754; *see also Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)(states not required to supply an attorney in a collateral postconviction proceeding); *Murray v. Giarratano*, 492 U.S. 1, 6-12 (1989)(applying *Finley* to collateral postconviction proceedings where the petitioner in under a sentence of death); *Hamm v. State*, CR-99-0654, 2002 WL 126990, at *5 (Ala. Crim. App. Feb. 1, 2002)("there is no right to counsel in a postconviction proceeding. ..."). Bearing the burden of his attorneys' errors, Maples was not entitled to an out-of-time appeal necessitated by such an error. Maples cannot avoid the *Coleman* line of cases simply by repackaging his claim in procedural due process wrapping. The result is the same; procedural due process does not require that Maples be allowed an out-of-time appeal of the denial of his postconviction petition. *See Wainwright v. Torna*, 455 U.S. 586, 588 n.4 (1982) ("Respondent was not denied due process of law by the fact that counsel deprived him of his

right to petition the Florida Supreme Court for review. Such deprivation – even if implicating a due process interest – was caused by his counsel, and not by the state. Certainly, the actions of the Florida Supreme Court in dismissing an application for review that was not filed timely did not deprive respondent of due process of law."); *Arzanipour v. I.N.S.*, 866 F.2d 743, 746 (5th Cir. 1989)(the dismissal of an appeal of an order to deport petitioner as untimely filed is not a violation of petitioner's right to due process); *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343-44 (1st Cir. 2004)(dismissing petition seeking review of deportation order as untimely); *United States v. Torres*, 372 F.3d 1159, 1161-63 (10th Cir. 2004)(an attorney's misreading of an unambiguous rule is not "excusable neglect" excusing an untimely appeal); *United States v. Salinas*, 365 F.3d 582, 586, 590 (7th Cir. 2004)(dismissing appeal as untimely).

At the end of the day, Maples's petition is an attempt to use procedural due process to circumvent this Court's holdings in *Pennsylvania v. Finley*, 481 U.S. 551, and *Murray v. Giarratano*, 492 U.S. 1, that there is no right to counsel in collateral postconviction proceedings. If this Court were to hold that a petitioner is entitled, as a matter of procedural due process, to an out-of-time appeal of the denial of his postconviction petition when he failed to timely file notice of appeal through error of postconviction counsel, it would, in effect, be holding that a petitioner has a right to effective assistance of counsel in those proceedings. Following such a holding, any petitioner whose postconviction petition was dismissed as insufficiently plead or for failure to follow any other procedural requirement could presumably allege that the dismissal was due to his attorney's error or incompetence; therefore, he would argue, under procedural due process, that he was entitled to file a second petition – again, in effect, granting a right (through the backdoor) to effective assistance of counsel in postconviction proceedings.

Because this Court has foreclosed Maples's claim, and he has offered no reasons for overruling *Coleman, Finley*, or *Murray*, certiorari should be denied..

C. This Court Should Not Grant Certiorari to Review a State Court's Application of a State Remedy.

This Court should not grant certiorari to review the Supreme Court of Alabama's application of Rule 21 of the Alabama Rules of Appellate Procedure, a state law remedy. Maples cannot definitively point to any federal question decided by the Supreme Court of Alabama when it summarily denied his petition for an Alabama writ of mandamus. As noted above, the Supreme Court of Alabama could have denied Maples's petition for a writ of mandamus for a number of reasons that do not involve a federal question; thus, any review by this Court would be a review of the propriety of a state court's application of a state law.

For instance, under Rule 21 of the Alabama Rules of Appellate Procedure, the time for filing a petition for writ of mandamus is a reasonable time, presumptively forty-two days. *See* Ala. R. App. P. 21(a); *Ex parte Morris*, 782 So. 2d 249, 251 n.2 (Ala. 2000)(citing *Ex parte Butts*, 775 So. 2d 173, 176 (Ala. 2000)). If a petitioner fails of file his petition for a writ of mandamus within the forty-two days, then petitioner must show good cause for the appellate court to consider the petition by filing a statement with the petition. *Id.* An untimely petition for a writ of mandamus must contain a statement showing good cause, as required under Rule 21 of the Alabama Rules of Appellate Procedure, or it will be denied. *Ex parte Sharp*, CR-1020781, 2003 WL 23025608, at *3 (Ala. Dec. 30, 2003)("Because the State's petition for the writ of prohibition was not timely filed and did not include the statement of good cause for the appellate court to consider the petition as required by Rule 21, Ala. R. App. P., we conclude that the Court of Criminal Appeals should not have considered the State's petition for the writ of

prohibition."); *Ex parte Davis*, 834 So. 2d 830, 832-33 (Ala. Crim. App. 2002)(same). Maples's Rule 32 petition was denied on May 22, 2003. Maples's time to file a notice of appeal lapsed on July 5, 2003. Maples did not file his petition for writ of mandamus with the Alabama Court of Criminal Appeals until October 8, 2003. The Supreme Court of Alabama could have determined that Maples's petition was filed fifty-five days after the reasonable time to file a petition for a writ of mandamus had lapsed. Maples did not file in his petition a statement in support of the untimely filing as required by Rule 21 of the Alabama Rules of Appellate Procedure. Therefore, the Supreme Court of Alabama could have denied Maples petition for failure to abide by Rule 21 – failing to file a mandatory statement showing good cause for his failure to timely file his petition for writ of mandamus.

Additionally, the Supreme Court of Alabama could have *sua sponte* determined that there was not good cause for the appellate court of consider Maples's late petition for writ of mandamus. This Court has held that attorney error is not cause in a federal habeas corpus proceedings. *Coleman*, 501 U.S. at 754 ("Attorney ignorance or inadvertence is not 'cause'" ... in a federal habeas corpus setting.); *see also Bagwell v. Dretke*, 372 F.3d 748, 756 (5th 2004)(same); *Rouse v. Lee*, 339 F.3d 238, 250 (4th 2003)(same); *Ritchie v. Eberhart*, 11 F.3d 587, 592 (6th 1993). It follows that the Supreme Court of Alabama could have determined that attorney error does not constitute good cause for the untimely filing of a petition for an Alabama writ of mandamus. Clearly, the denial of a petition for a writ of mandamus for failure to abide by the state procedure for petitioning for that writ does not involve a federal question.

Furthermore, there are no substantial federal questions involved in a state court's refusal to allow an appeal of the denial of a state postconviction petition when that refusal is based on a state law time bar. In *Coleman v. Thompson*, this Court recognized that the dismissal of an untimely appeal of the denial of a state

postconviction petition on state procedural grounds does not raise any federal questions. 501 U.S. 722, 740 (1991). The *Coleman* Court stated:

> Coleman does not argue, *nor could he*, that it "fairly appears" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with such law. The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition ... based solely on Coleman's failure to meet the Supreme Court's time requirements. There is no mention of federal law in the Virginia Supreme Court's three-sentence dismissal order. It "fairly appears" to rest primarily on state law.

Id. at 740 (emphasis added). Because the Virginia Supreme Court dismissed Coleman's appeal as untimely under Virginia law, there was no federal question involved in that dismissal. *Id.*[2]

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[2] Although there is a presumption that a state decision rests on federal law unless the state court expressly states otherwise, that presumption does not apply in this case. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The *Long* Court stated that:

> [W]hen ... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. In order for the *Long* presumption to apply, however, the state court's decision must "appear to rest primarily on federal law or to be interwoven with federal law." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991). Because the denial of Maples's petition for a writ of mandamus does not appear to rest on federal law, there is no presumption that federal law was the basis of the decision.

Although not in a federal habeas corpus posture as *Coleman*, Maples's case is analogous. *See id.* Maples failed to file a notice of appeal of the denial of his Rule 32 petition within the time limit set under Alabama law. He then filed a petition for a writ of mandamus requesting that the Supreme Court of Alabama order the trial court to allow him to file an untimely notice of appeal, which was denied. Maples's inability to appeal the denial of his Rule 32 petition is due to his failure to abide by Alabama's procedural time limits. Thus, the Supreme Court of Alabama's denial of Maples's petition, enforcing Alabama's statutory time limit, did not "rest primarily on federal law [and was not] interwoven with such law." *See Id.*

Because Maples cannot show that the Supreme Court of Alabama's decided any federal question when it summarily denied his petition for a writ of mandamus and because there is no substantial federal question involved in a state court's denial of an untimely appeal, a grant of certiorari review by this Court would be to determine the propriety of a state court's application of a state law. A determination of the propriety of a state court's application of a state law is not worthy of this Court's certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny Maples's petition for certiorari.

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January 5, 2005

(3)

Supreme Court, U.S.
FILED
FEB 15 2005
OFFICE OF THE CLERK

No. 04-765

IN THE

Supreme Court of the United States

CORY R. MAPLES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

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ARGUMENT

The State of Alabama offers four reasons why this Court should deny certiorari. First, that the question presented here would require this Court to revisit or overrule its prior holding in *Coleman v. Thompson*, 501 U.S. 722 (1991). (State's Opposition to Certiorari ("Opp.") at 7-10.) Second, that the decision below cannot be in conflict with the Florida Supreme Court's decision in *Williams v. State*, 777 So. 2d 947 (Fla. 2001), because the two courts considered requests for untimely appeal under two different procedural rules. (Opp. at 5-7.) Third, despite the fact that both parties below argued the application of federal due process, the Alabama Supreme Court's summary denial does not entitle Mr. Maples to the presumption established in *Michigan v. Long*, 463 U.S. 1032 (1983). (Opp. at 12 n.2.) Fourth, that the Alabama Supreme Court could have avoided constitutional issues entirely by denying the requested writ of mandamus as untimely. (Opp. at 10-13.)

This Court may dispose of each argument summarily. None is supported by the record below or by this Court's prior holdings, and at least one argument stretches the very limits of good faith.

I. Alabama Misses the Point Entirely – the Very Nature of the Conflict Between *Williams* and the Opinion Below Takes This Case Beyond *Coleman v. Thompson*.

Alabama's entire opposition to certiorari fails to address the one central fact that establishes both the conflict between state courts of last resort and the reason why the question presented here goes beyond this Court's prior holding in *Coleman v. Thompson*, 501 U.S. 722 (1991). Under the point heading "This Court Should Deny Certiorari Because Maples's Claim is Without Merit," Alabama quotes Mr. Maples's question presented. (Opp. at 7.) It does so, however, with a strategically-placed ellipse.

While simultaneously invoking *Coleman v. Thompson*, the Alabama Attorney General's Office offers the following quotation – omitting the most salient part:

> [W]hether the due process clauses of the 5th and 14th Amendments to the United States Constitution

> require the states to permit an untimely appeal from the denial of state post-conviction relief where that appeal is untimely solely through an error of counsel ***[and in disregard of specific instructions from a capital defendant.]***

(Opp. at 7) (emphasis supplied noting material omitted in original.) The omitted material in Mr. Maples's question presented is not only replaced by an ellipse, but is left completely unaddressed anywhere in the State's brief. Yet, the omitted material provides both the central basis for the conflict at issue and the reason that this case goes beyond the purview of *Coleman*.[1]

The Florida Supreme Court in *Williams* and the court below both addressed the limits of fundamental fairness. *Williams*, 777 So. 2d at 950; *see also* App. C. Neither case involved a mere error of counsel (as in *Coleman*), but instead decided whether to permit an untimely appeal where a capital defendant specifically directed his counsel to appeal and where that counsel specifically promised to do so. *Williams* considered this Court's prior decision in *Coleman* and, notwithstanding that decision, decided that where – as here – a capital defendant requests and receives specific assurances from counsel, federal due process requires the states to permit an untimely appeal. *Williams*, 777 So. 2d at 950.[2] The court below denied exactly the same relief on exactly the same facts. Alabama should not be permitted to obscure that fact by misquoting and then leaving unaddressed the central portion of the question presented.

II. Alabama Cannot Eliminate the Conflict with *Williams* Merely by Noting That the Two States Have Different Rules of Criminal Procedure.

Alabama seeks to distinguish *Williams* by noting that "the Alabama and Florida Courts were deciding procedural issues under separate state procedural rules regarding state law

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1. *Coleman* also is distinguishable as a federal habeas case solely addressing the right to counsel. 501 U.S. at 727, 752-57.

2. The State in *Williams* specifically relied on this Court's prior decision in *Coleman*. *See, e.g.*, State of Florida's Brief at 7, 8, 9.

remedies." (Opp. at 6.) Indeed, the State goes on to claim that "[t]he Florida Supreme Court – it goes without saying – was not applying Rule 21 of the Alabama Rules of Appellate Procedure and made no determination regarding the procedure that a petitioner must follow in order to obtain a writ of mandamus or a determination of the showing that a petitioner must establish under Rule 21 in order to obtain such writ." (Opp. at 6.)

In response to such arguments, Mr. Maples can only say "exactly right." Yet, what the State fails to understand is that Florida and Alabama both faced precisely the same question – *i.e.*, irrespective of whether Florida was interpreting Rule 3.850 and Alabama interpreting Rule 32, they both decided whether federal due process requires the states to permit an untimely appeal on identical facts. What Florida and Alabama Rules say is very much beside the point (*n.b.*, the rules apparently are identical in all material respects – and Alabama fails to claim otherwise), what matters is whether two state courts of last resort were faced with a federal constitutional requirement and how they decided. Here, Alabama decided that federal due process does not require the states to permit an untimely appeal in such circumstances, whereas Florida decided that it does. That basic conflict is what Mr. Maples would have this Court resolve.

III. Alabama Cannot Hide Behind the Silence of Its Supreme Court

Alabama repeatedly seeks to invoke its Supreme Court's summary denial of relief as a reason for this Court to deny certiorari. *See, e.g.*, Opp. at 5 ("The Supreme Court of Alabama, reviewing Maples's petition *de novo*, denied his petition without opinion in a one-sentence order. In the face of that void, Maples cannot show . . ."); Opp. at 7 ("It is impossible to determine how – or even whether – the Supreme Court of Alabama passed on any federal question when it denied Maples's petition."); Opp. at 10 ("Maples cannot definitively point to any federal question decided by the Supreme Court of Alabama when it summarily denied his petition for an Alabama writ of mandamus.") Yet, a state court may not effectively rule on a federal question explicitly raised by the

parties and then try to cloak its decision in silence so as to impede meaningful review. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

"Where a state court decision fairly appears to be interwoven with the federal law, and when the adequacy and independence of any possible state ground is not clear from the face of the opinion, [this Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* The proceedings below more than meet this standard.

As a preliminary matter, the mandamus proceeding below[3] was the second such proceeding for Mr. Maples. Both Mr. Maples and the Alabama Attorney General started out in the Alabama Court of Criminal Appeals. *See* App. B. In that mandamus proceeding, both Mr. Maples and the State argued the applicability of federal due process, and the opinion below specifically rejected Mr. Maples's federal due process claim. *Id.* at 12a ("Maples has failed to show that his right to procedural due process was violated."). Mr. Maples then followed the next step and sought the same mandamus relief from the next higher authority – the Alabama Supreme Court. *See* App. A. Again, both Mr. Maples and the Alabama Attorney General extensively briefed the requirements of federal due process. *See, e.g.*, Petition for Writ of Mandamus at 2, 7-10, 16-18, 20; State's Opposition to Mandamus, 6-13, 23, 24, 25 n.6, 26, 27.

To invoke this Court's jurisdiction requires nothing more. When a state court of last resort issues a summary opinion, the parties' briefing of the issues determines whether a federal question has been fairly presented and decided. *See Campbell v. Louisiana*, 523 U.S. 392, 403 (1998). Here, the *Long* and *Campbell* presumptions are met, and this Court should reject Alabama's attempt to rely on the silence of its own Supreme Court.

IV. Alabama Frivolously Suggests That The Relief Sought Below Was Untimely.

In an attempt to avoid this Court's jurisdiction, Alabama suggests that the Court below may have denied mandamus

3. The Alabama Supreme Court previously held that mandamus is the only method by which a Rule 32 petitioner like Mr. Maples may seek an untimely appeal. *See Marshall v. State*, 884 So. 2d 900, 905 (Ala. 2003).

because Mr. Maples's request was untimely. (Opp. at 10-13.) This argument does nothing more than serve as an exemplar of the State's repeated willingness to go to almost any length to deny Mr. Maples his day in court.

The State argues that: (1) the Alabama Supreme Court was silent on its reasons for denying Mr. Maples's mandamus petition; (2) Rule 21 of the Alabama Rules of Appellate Procedure requires that a petitioner seek mandamus within a reasonable time, presumptively forty-two days; (3) Mr. Maples sought mandamus from the Court of Criminal Appeals "fifty-five days after the reasonable time to file a petition for a writ of mandamus had lapsed;" and (4) therefore, the Alabama Supreme Court could have denied Mr. Maples's second mandamus petition as untimely (even though the Court of Criminal Appeals had not). (Opp. at 11.) What the State somewhat disturbingly fails to report, however, is that the Alabama Supreme Court only established mandamus as the remedy for an untimely appeal in its *Marshall* decision on Sept. 26, 2003 – and that Mr. Maples then followed those specific instructions by seeking mandamus on October 8, 2003, ***just 12 days later***. *See generally Marshall v. State*, 884 So. 2d 900 (Ala. Sept. 26, 2003).

Not only were Mr. Maples's mandamus petitions unquestionably timely, but the State has never argued to the contrary in any court below. Not once, not ever, not to anyone.

Alabama seeks to run away from its own repeated arguments about federal due process. It seeks to run away from Mr. Maples's repeated invocation of federal constitutional rights. It even seeks to run away from the Appellate Court's explicit rejection of due process as a basis for an untimely appeal. It is now time for the State to stop running and to address the Petitioner's arguments on the merits.

CONCLUSION

For the foregoing reasons, and for those reasons stated in his original petition, petitioner Cory R. Maples respectfully requests that this Court grant his Petition for a Writ of Certiorari to the Supreme Court of Alabama.

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